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No. 97-577

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

D.L. BAKER, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION NO. 6, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioner D.L. Baker, Inc. ("Baker") respectfully submits this reply to the brief of the respondent National Labor Relations Board ("Board") opposing Baker's petition for writ of certiorari.

MAINTENANCE OF THE 5-4 CIRCUIT CONFLICT BY DENIAL OF THE PETITION FOR WRIT OF CERTIORARI WILL COMPOUND THE UNCERTAINTY LEVEL FOR SMALL CONSTRUCTION EMPLOYERS INTENDING TO EXERCISE THEIR "UNDOUBTED RIGHT TO REPUDIATE" PREHIRE AGREEMENTS.

To enforce its order in the court below, the Board unquestionably had the burden to demonstrate that it had applied the extant holding of this Court in *Jim McNeff v. Todd*, 461 U.S. 260 (1983),

properly to the situation before it. As the Fourth Circuit found, the Board did not do so and hence the Fourth Circuit reviewed the decision in compliance with this Court's jurisprudence.

The Board's opposition here continues its position that *John Deklewa & Sons, Inc.*, 282 N.L.R.B. No. 184 (1987), is applicable to this case, opp. at 10, when the Fourth Circuit explicitly held that the case was *not*. 6a n.3. The Board's ALJ made only one passing reference to *Deklewa*, and that was when he rejected Petitioner's argument that the union needed to show majority support from the bargaining unit to permit enforcement of the prehire agreement. Pet. 35a.

In its presentation, the Board's opposition confirms the existence of a body of caselaw in the Fourth, Fifth, and Eleventh Circuits, *see Sheet Metal Workers Nat'l Coal Fund v. S.L. Pappas & Co., Inc.*, 106 F.3d 970, 973 (11th Cir. 1997), that have not accepted the Board's *Deklewa* ruling, whereas the First, Third, Seventh, Eighth, Ninth, and Tenth Circuits have. Furthermore, despite the Board's acknowledgement that it recently lost again on the applicability of *Deklewa* in the Fourth Circuit in *Industrial Turnaround Corp. v. NLRB*, 115 F.3d 248 (1997), opp. at 10 n.3, it has not sought to have this Court review the merits of the Fourth Circuit's refusal to acknowledge *Deklewa* by filing a petition for writ of certiorari in *Industrial Turnaround* or the instant case.[1]

The General Counsel's opposition goes further and asserts that the pre-*Deklewa* body of caselaw is not applicable here or "of continuing practical significance" to merit this Court's consideration. Opp. at 10. Since the Board acknowledges that only six

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[1]The case of *NLRB v. D.C. Mason Builders, Inc.*, 321 N.L.R.B. 1081 (1996), *on pet. for review*, No. 97-1414 (4th Cir.), which the Board states it had sought en banc review at p. 10 n.3 of its Opposition, had been resolved nine days before it filed its opposition brief. What the Board had filed was a motion for *hearing* en banc on October 21, 1997. The case was argued before a panel of the Fourth Circuit on October 31, 1997. On November 21, 1997, the Fourth Circuit denied the Board's motion for hearing en banc. The panel's opinion is pending. However, the case does not present a *Deklewa* issue as the Board suggests.

circuits have agreed with its position in *Deklewa*, opp. at 4-5, and two of those, the First and Ninth Circuits, *C.E.K. Ind. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990), *Mesa Verde Const. Co. v. Northern Dist Council of Laborers*, 885 F.2d 594 (9th Cir. 1989), along with the Fifth Circuit, *Local Union 953 v. Mar-Len of Louisiana, Inc.*, 906 F.2d 200, 204 (5th Cir. 1990), hold the case will not be retroactively applied, then there is also a discrete and continuing conflict with the First, Fourth, Fifth, Ninth, and Eleventh Circuits on the Question Presented: whether an employer's repudiation of a pre-hire agreement formed prior to *Deklewa* in 1986 must be communicated to the union. These Courts will continue to apply the law of *Todd v. McNeff* and not *Deklewa*.[2]

On the contention that Petitioner can only prevail if *Deklewa* is "invalid" or "inappropriate to apply," Opp. at 11, the Board begs the question whether *Deklewa* was properly decided in the first instance. Since it has not acquiesced or sought review of that decision in this Court from every circuit that has agreed and disagreed with its position, the claim is not meritorious because the cases has been shielded from this Court's review.[3] Furthermore, *Deklewa* is inappropriate to apply in this case since the Fourth Circuit held it was inapplicable.[4]

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[2]The question has not been directly considered in the District of Columbia or the Second Circuit: *Wilson & Sons Heating & Plumbing, Inc. v. NLRB*, 971 F.2d 758 (D.C. Cir. 1992); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 314 (2d Cir.), *cert. denied*, 498 U.S. 982 (1990).

[3]Noticeably absent from the Board's opposition is any attempt to explain statements made to the Court in its original opposition to certiorari in *Deklewa v. NLRB*, No. 88-70 (1988), that prehire agreements would continue to be voluntary, the case would not require involuntary recognition of the union as a bargaining agent, and that prehire agreements would continue to be of limited duration. Pet. at 15-16, 19 n.13.

[4]The Board also suggests that Petitioner failed to make the argument before the Board that pre-*Deklewa* law applied. Inasmuch as Baker's Exception 11 to the Board stated Dan Baker "decided not to honor the prehire agreement," the Board failed to address that argument when it was specifically made, the Fourth Circuit

(continued...)

On the Board's contention that Petitioner "does not squarely challenge the validity or applicability of *Deklewa*," opp. at 12, Petitioner agrees the legal question in this case does not involve *Deklewa* at all, but concerns whether the Fourth Circuit's interpretation of *McNeff v. Todd* that an effective act of repudiation requires actual notice of repudiation communicated to the minority union. Certainly, Section 8(f) of the Labor Act does not suggest that a Board-sponsored election is an exclusive mechanism for an employer to void a prehire agreement, a fact consistent with this Court's affirmation that either party to a prehire agreement is individually empowered "to exercise its undoubted right to repudiate a prehire agreement...." *McNeff*, 461 U.S. at 270. Neither does an employer's unilateral repudiation/termination of a prehire agreement advance, affect, nor diminish any Section 7 right.

Moreover, the Board's contention that the circuit conflict raised by cases cited in the Petition are otherwise distinguishable is not supported in this record or by a finding of fact that "the employer had concealed from the union its noncompliance with the prehire agreement." Opp. at 12 n.6, Rather, the record reveals that for sixteen years, both D.L. Baker, Electrical Contractor and D.L. Baker, Inc. were run openly and without concealment from the union. This is especially noticeable in the fact that Petitioner had sought and obtained contracts published in the Dodge reports and openly hired members of the local union as employees. 16a, 43a-46a. There would be no reason to conceal its operations from the union since Baker had long ago manifested the intention to repudiate the prehire agreement or as the ALJ concluded: "he later decided not to honor the prehire agreements." 48a. *Id.*

These factors coincide with Petitioner's demonstration that prehire agreements are regularly infected with elements of coercion,

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[4](...continued)
heard and decided the case thereon, and the Board has never demonstrated any receptivity to reconsider the argument, the argument is thin. The Board had notice of Petitioner's Exceptions; that is all that is required under Section 10(e) of the Act, 29 U.S.C. § 160(e). *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1174 (D.C. Cir. 1993).

deceit, and fraud. Pet. at 19-21. The ALJ found that Dan Baker's original interest in the union was to allow him to continue to participate in the union's health and welfare funds as he had as a union member. 27a. Dan Baker was told by business agent Wade Sheriff that he could not continue to participate in the union's special plans *once* he hired employees, at which point Dan Baker would have no *personal* interest in a union contract. 27a.

In the instant case, both contract principals (Baker and Sheriff) testified that the Letter of Assent was intended by them to apply to Dan Baker's sole proprietorship D.L. Baker, Electrical Contractor. Yet, the Board's ALJ finds that Dan Baker "misled" Sheriff into believing this. 28a. Hence, the named party to the Letter of Assent, *viz.*, D.L. Baker, Electrical Contractor, is not held to the bargain, but a third party, D.L. Baker, Inc., is. The result is not unlike the cases of *Central States Southeast & Southwest Areas Pension Fund v. Gerber Trucking Svc., Inc.*, 870 F.2d 148 (7th Cir. 1987), and *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984), set forth in the Petition at 20-21, where the principals intend one purpose, but the courts direct another years later. The Board's opposition at 12 n.6 does not explain how a federal policy that tolerates voluntary prehire agreements is fostered by permitting them to be the object of coercion and "bait and switch policies."

Finally, the Board has not refuted that Petitioner's second Question Presented identifies a discrete conflict between the conclusion of the Fourth Circuit below that a prehire agreement automatically rolls over indefinitely and the District of Columbia Circuit in *Wilson & Sons Heating & Plumbing , Inc. v. NLRB*, 971 F.2d 758 (D.C. Cir. 1992), that held they do not. *See* Pet. at 15.

The question here for the Court is one of timing. The 5-4 conflict in the circuit courts will continue until such time as this Court grants certiorari to decide how an employer may exercise its "undoubted right to repudiate" a prehire agreement. However, for small employers in the construction industry with limited resources to contest the Board's position, denial of the writ will raise their

economic stakes in properly dealing with industry labor unions and also interfere with their being treated equally in all circuits.[5]

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: December 11, 1997

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[5]The fact that the decision of the court of appeals below is unpublished should carry no weight in the Court's decision to review the case. *See Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 4 (1987) (court of appeals exceeded jurisdiction regardless of non-publication or lack of precedential effect of a non-published ruling).